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No. 96-184

In The

# Supreme Court of the United States

October Term, 1995

LIFE INSURANCE COMPANY OF GEORGIA,

*Petitioner,*

v.

DAISEY L. JOHNSON,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether a GVR order is warranted considering the fact that the Alabama Supreme Court independently reviewed the punitive verdict consistent with the "guideposts" set forth in *BMW v. Gore* and determined that the punitive award, as remitted to $5 million, was appropriate punishment considering the facts of this case.

II. Whether Life of Georgia waived the right to assert in its petition that the punitive damage award constituted improper "extraterritorial punishment" by failing to raise this issue in the trial court, and by specifically stating on appeal to the Alabama Supreme Court that it did not seek reversal based upon Respondent's closing arguments to the jury.

III. Whether this Court should accept plenary review and consider Life of Georgia's contention that the $5 million punitive award is "duplicative punishment" when Life of Georgia failed to properly preserve this issue in the Alabama courts below.

IV. Whether this Court should accept plenary review and consider Life of Georgia's argument that it was not provided fair notice that its illegal conduct would subject it to a substantial punitive punishment in Alabama when Life of Georgia failed to properly preserve this issue in the Alabama courts below.

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## STATEMENT OF JURISDICTION

Ms. Johnson agrees that this Court has jurisdiction to consider whether the $5 million punitive award in this case is "grossly excessive" punishment in violation of the Due Process Clause (Question 1). However, Life of Georgia never properly raised Questions 2, 3, and 4 in the Alabama courts below. Accordingly, pursuant to 28 U.S.C. § 1257(a), these newly presented arguments are not properly presented for review.

## STATEMENT OF THE CASE

Pursuant to Rule 15, Respondent Johnson takes this opportunity to correct some of the factual statements in the petition, as well as relate to the Court additional facts which Life Insurance Company of Georgia ("Life of Georgia") fails to reveal.

Daisey Johnson sued Life of Georgia alleging that it had engaged in intentional and reckless fraud and fraudulent suppression by selling her a medicare supplement policy that was worthless to her because she was receiving Alabama medicaid benefits. Indeed, Life of Georgia admitted that it was illegal in every state it did business to sell a medicaid-recipient its supplement policy because it provided the same benefits provided by medicaid. Ms. Johnson had dealt with Life of Georgia for many,

many years, during which time she was sold nine different life insurance policies.[1]

Ms. Johnson was 84 years old at the time of trial and resided in rural Clarke County, Alabama. After completing the third grade, she quit school to help her family make a living after her father became ill. She and her thirteen brothers and sisters moved across Alabama, with Ms. Johnson washing, ironing, and cooking to help provide for her family. While living in Selma, Alabama, Ms. Johnson took out her first policy with Life of Georgia (presently a $2.3 billion company) – some time before World War II. Ms. Johnson has never had a checking account or driver's license, and can barely read or write due to her lack of education and physical infirmities.

Sometime before January 8, 1990, Life of Georgia's agent, Barbara Holt, came to Ms. Johnson's home to collect the monthly premiums on these nine life policies. During this visit, Ms. Holt recommended that Ms. Johnson purchase a medicare supplement policy. The next week, Ms. Holt returned and again informed Ms. Johnson that she needed to purchase the supplement policy because it would pay any medical bills that Ms. Johnson might incur in the event she became ill. Based on these representations, Ms. Johnson agreed to purchase the supplement policy, and Ms. Holt filled out the application.

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[1] These nine life insurance policies were all current at the time of trial, and included one policy on Ms. Johnson's nephew, one policy on her son, one policy on one of her brothers, two polices on another brother, three policies on her own life, and one policy for someone named "Daisey Lee Carter," who Ms. Johnson does not know.

This application included several questions to be answered by Ms. Johnson, one of which asked whether she was a medicaid-recipient. To complete the application, Ms. Holt asked to see Ms. Johnson's medicare card. At that time, Ms. Johnson handed Ms. Holt all of her insurance cards, which included her Alabama Medicaid card.

Ms. Holt knew that it was illegal and against company policy to sell the supplement policy to Ms. Johnson if she was on medicaid. Despite the fact that Ms. Johnson handed Ms. Holt her Alabama Medicaid card, Ms. Holt indicated on the application that Ms. Johnson was not on medicaid. Ms. Holt also collected the first month's premium of $71.00 on the policy. Ms. Johnson discovered in 1992 that the supplement policy was worthless because she was on medicaid. By this time, the monthly premiums had risen to $103.00. During the three-year period from 1990 through 1992, Ms. Johnson paid almost one-third of her fixed income for the medicare supplement policy.[2]

Contrary to Life of Georgia's factual assertion in its petition, Ms. Johnson proved that Life of Georgia was itself guilty of a punishable tort under Alabama law. The Alabama legislature modified the common law rule of vicarious liability in 1987 by requiring a plaintiff to prove a higher degree of culpability on the part of the principal before punitive damages can be imposed against the principal for the conduct of its agent. *See* Alabama Code § 6-11-27 (1975). To meet this higher burden of proof, Ms.

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[2] Ms. Johnson received a monthly social security check of approximately $250. *See* Tr. at 511.

Johnson proved that Life of Georgia intentionally employed incompetent agents to sell its supplement policy to individuals who did not need the policy because they were medicaid-recipients. Additionally, Ms. Johnson proved that Life of Georgia's corporate officers actually knew that their agents illegally sold these policies to dual-eligible individuals, but nevertheless, refused to prevent or rectify this illegal behavior.

Ms. Holt, who was terminated by Life of Georgia for misappropriation of premiums, admitted that she never received any specific training with regard to selling the medicare supplement policy. Tr. at 430. Other former agents also testified that they received inadequate training with regard to the sale of Life of Georgia's supplement policy. One agent testified that his training could be summed up in three words – "get the money." Tr. at 188. Another agent stated that he would fear losing his job if he informed the company executives that there were Life of Georgia medicare supplement policyholders who were also on medicaid. In fact, when this agent was asked whether he would want Life of Georgia selling his grandmother a supplement policy, he responded by stating, "I think if someone came to a member of my family and employed the tactics that we were shown, I would probably hunt him down." Tr. at 211-212.

After a number of months, Ms. Johnson began having problems making the monthly premium payments on the supplemental policy. Eric Peek, a former district manager, had been instructed by upper management "to go out and do whatever it takes to get [the] premium caught up" on medicare supplement policyholders who were delinquent on their monthly payments. Accordingly, Mr. Peek

met the collecting agent at Ms. Johnson's home to discuss the past due premiums. Mr. Peek testified that he showed Ms. Johnson a newspaper clipping from the *Mobile Press Register* that he kept "for such purposes" where an Alabama resident had lost her home to a local hospital in a court judgment. Mr. Peek then asked Ms. Johnson, "Which one is going to be easier to afford, the liability of not having the coverage, or the coverage. You know, you could lose your house." Tr. at 146-147. Mr. Peek testified that he typically used this sales technique since "you can't, you know, go out and use a stick on the people naturally, so your primary tool is fear." Tr. at 147. After hearing this sales pitch, Ms. Johnson paid her premiums to keep the policy in force.

Life of Georgia's regional Vice-President was also informed that there were dual-eligible individuals that had been sold this same medicare supplement policy. In response to Mr. Peek's inquiry as to what should be done to correct this problem, the Vice-President instructed Mr. Peek to go back to those individuals and convince them to keep paying on the medicare supplement policies because they "could come off of medicaid and would need the medicare supplement." *See* Tr. at 141. Later, Life of Georgia threatened to fire Mr. Peek for informing individuals that they would not be eligible for the medicare supplement policy if they were on medicaid, *See* Tr. at 143, but he quit before he could be fired.

As Life of Georgia acknowledges, it suffered an adverse verdict in a previous case where two of its agents had sold a medicare supplement policy to an individual that was not on medicare, but on medicaid. *See Foster v. Life Ins. Co. of Georgia*, 656 So.2d 333 (Ala. 1994). After the

verdict was rendered in *Foster*, Mr. Peek, a defendant in the *Foster* case, met with the company's Regional Vice-President and requested that Life of Georgia undertake a program to identify those dual-eligible individuals who had been improperly sold its supplement policy. Additionally, Mr. Peek implored the company to begin properly training its agents as to the sale of its medicare supplement policy. Life of Georgia ignored this request, stating, "we need to find somebody that will buy insurance." Tr. at 147-148. Life of Georgia's Marketing Vice-President, Robert Hayes, further confirmed that Life of Georgia had taken no steps after the *Foster* verdict to discover whether dual-eligible individuals were being sold its medicare supplement policy. Instead, Life of Georgia simply continued to collect premiums on all its medicare supplement policies sold in the State of Alabama.

Life of Georgia claims that its company policy specifies that if a medicare supplement policy were sold to a dual-eligible individual, then the premiums would be returned. It further contends that any agent who improperly sold a supplement policy to a dual-eligible individual would lose all commissions received from the sale. At trial, however, Ms. Johnson proved that these company policies were intentionally ignored. For instance, Ms. Holt was never required to return any commissions she earned by making this illegal sale to Ms. Johnson. Tr. at 458. Additionally, at the post-trial hearing, testimony was presented that Life of Georgia had sold a medicare supplement policy to a 91-year-old medicaid-recipient, that Life of Georgia had been asked to return his premiums, but refused to refund those premiums. This evidence led

the trial court to conclude that it was concerned "as to the quality of Life of Georgia's assertion that it would refund premiums once an unqualified policyholder came forward." Pet. App. at 14a.

Next, Life of Georgia claims that Ms. Johnson improperly focused the jury's attention on Life of Georgia's out-of-state conduct by introducing "pattern and practice" testimony from two individuals who lived in Florida, and then commenting on their testimony during closing. Life of Georgia's objection to this testimony, however, was not based upon any federal constitutional concern, but rather, was based on relevancy grounds. Furthermore, Life of Georgia failed to make any objection to counsel's statements in closing arguments.

At the conclusion of all the evidence, Life of Georgia argued its motion for directed verdict, but never claimed that the punitive claim would constitute "duplicative punishment." And although Life of Georgia now claims that the Alabama punitive damage system contains constitutionally inadequate standards, it failed to submit any alternative jury charges as to how to more clearly charge the jury with regard to the imposition of punitive damages.

The jury thereafter returned a $250,000 compensatory award and a $15 million punitive award. After considerable post-trial discovery, the trial court held a *Hammond/Green Oil* hearing[3] to address Life of Georgia's motions for new trial, remittitur, and/or JNOV. After the hearing on these motions, the trial court entered a very detailed

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[3] *See Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 593 So.2d 218 (Ala. 1989).

and exhaustive opinion concluding that the punitive damage verdict should be remitted to $12.5 million. Ms. Johnson accepted the remittitur, and Life of Georgia appealed to the Alabama Supreme Court.

On November 17, 1995, the Alabama Supreme Court released its opinion upholding the jury's finding that Life of Georgia was guilty of intentional and reckless fraud. Nevertheless, in independently reviewing the record evidence, the Alabama Supreme Court concluded that the $12.5 million punitive award, as remitted by the trial court, exceeded an amount necessary to punish and deter Life of Georgia for its illegal conduct. The Alabama Supreme Court accordingly reduced the punitive award to $5 million, concluding that this amount was justified considering the egregious conduct engaged in by Life of Georgia's corporate officers and sales agents towards not only Ms. Johnson, but other similar Alabama citizens.

The opinion further made substantial procedural and substantive changes to all future trials where punitive damages are sought. The court, in following Justice O'Connor's suggestion made in her dissenting opinion in *Haslip*, held that all punitive damage cases from this point forward shall be bifurcated. In the first phase, the jury will decide liability and award an appropriate compensatory award, and will also decide whether punitive damages are justified. If so, then the trial resumes and all evidence that had previously been admissible in the *Hammond/Green Oil* hearing will be heard by the jury in determining the amount of the punitive damage award. Furthermore, after post-trial review and appellate review, the punitive damage award is to be deposited with the clerk of court, and the clerk is required to divide the

punitive damage award equally between the State of Alabama and the plaintiff, less attorney fees and costs. Contrary to Life of Georgia's contention, these new procedures were not created to address any of Life of Georgia's federal due process arguments. Rather, the Alabama Supreme Court adopted these new procedures on its own intitiative to ensure that defendants are afforded the highest level of due process possible.[4]

On April 27, 1996, on application for rehearing by both parties, the court withdrew its earlier opinion substituting its second opinion. This new opinion clarified its earlier holdings concerning the new procedures to be implemented in future cases, and reaffirmed its earlier findings relating to the $5 million punitive award.

## REASONS FOR DENYING THE WRIT

### I. A GVR Order Is Not Warranted In This Case Since The Alabama Supreme Court Independently Reviewed The Punitive Damage Award And Remitted The Judgment To $5 Million, And In So Doing, Utilized Those Standards As Set Forth In *BMW v. Gore.*

The Alabama Supreme Court's opinion in this case reveals that it is not based upon a premise that is in conflict with this Court's opinion in *BMW of North America, Inc. v. Gore,* 116 S. Ct. 1589 (1996). To the contrary, the standards utilized by the Alabama Supreme Court in

[4] These new procedures take effect 90 days after the opinion becomes final.

evaluating Life of Georgia's excessiveness claim are totally consistent with this Court's rationale and holding in *BMW*, and for this reason, a GVR order is not warranted.

In a unanimous decision,[5] the Alabama Supreme Court held that the trial court correctly "focused on the conduct of Life of Georgia to determine whether the punishment was excessive in relationship to that conduct." The court also found that the trial judge properly "considered the public policy upon which punitive damages are based: to eradicate intentional conduct by the particular defendant before the court and to deter others from similar conduct." Pet App. at 15a. This rationale is completely consistent with this Court's statement found in *BMW*: "Punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition. . . . For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW v. Gore*, 116 S. Ct. at 1595.

The Alabama courts below agreed with the jury's conclusion that Life of Georgia preyed upon "a group of citizens that need[ed] the most protection: elderly, uneducated, and low income." Pet. App. at 13a. Life of Georgia's corporate officers and its sales agents were acutely aware that Ms. Johnson and the other Alabama victims were "easily persuaded, and [that Life of Georgia] used

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[5] All nine justices concurred in the court's decision that the $5 million punitive award was appropriate punishment considering the facts of this case. *See* Pet. App. at 41a.

sales techniques such as 'fear' to sell these policies." Pet. App. at 13a.

The Alabama Supreme Court also independently reviewed the evidence, finding that Life of Georgia had engaged in an intentional fraudulent scheme that was "egregious and reprehensible and resulted in a great financial hardship to some of the most vulnerable members of our society." Pet. App. at 36a. Furthermore, unlike the fraud committed in *BMW*, the Courts below noted that the Life of Georgia agents made affirmative false statements to Ms. Johnson that she needed the medicare supplement policy with actual knowledge that the policy would be totally worthless to her. *See* Pet. App. at 36a-37a. As the Alabama Supreme Court found, "Life of Georgia had no risk under these fraudulently sold policies" and the "practice was a sham and would never have been permitted in this state if the activities of insurance agents were properly regulated." Pet. App. at 37a.

In judging the reprehensibility of a defendant's conduct, there is a vast difference between a failure to disclose, as was the case in *BMW*, and an affirmative intentional misrepresentation accomplished with the intent to deceive. "To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, . . . , or when the target is financially vulnerable, can warrant a substantial penalty." *BMW*, 116 S. Ct. at 1599. In the present case, the Alabama courts noted that both of these factors were present in addressing Life of Georgia's excessiveness argument. Moreover, "the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that

no duty to disclose exists." *BMW*, 116 S. Ct. 1601. In the present case, the lower courts found that Life of Georgia's conduct was totally void of any good-faith conduct.

This Court in *BMW* also recognized that repeat offenders should be punished more severely than first offenders. "Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. . . Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance." *BMW v. Gore*, 116 S. Ct. at 1599-1600. And although the Alabama courts did not have the benefit of this Court's opinion in *BMW*, the courts below nevertheless utilized this logic in judging the extent of Life of Georgia's reprehensibility. First, the trial court concluded that even though Life of Georgia had experienced an adverse verdict in the *Foster* case for similar conduct, its corporate officers had done nothing to "ferret out and correct the problem" of its agents illegally selling medicare supplement policy to dual-eligible individuals. The Alabama Supreme Court also utilized this rationale in concluding that Life of Georgia had intentionally defrauded Ms. Johnson, finding that "there was evidence that she was not the only Alabama victim of such fraud."[6] Pet. App. at 12a.

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[6] In its petition, Life of Georgia incorrectly asserts that only one other Alabama citizen had been sold a medicare supplement policy although she was receiving Alabama

The Alabama Supreme Court then stated that it "independently reviewed the evidence in this case," and applied the factors set forth in *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989), cited in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), which included the "degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, *and the existence and frequency of similar past conduct.*" *See* Pet. App. at 36a (emphasis added). Based upon this *independent review*, the Alabama Supreme Court concluded that, although it found Life of Georgia's conduct reprehensible, when comparing Life of Georgia's conduct "with other acts perpetrated upon Alabama citizens," it was compelled to again reduce the punitive damage award from $12.5 million to $5 million. Pet. App. at 37a. In so doing, the Alabama Supreme Court properly utilized the standards as explained in *BMW*.

Life of Georgia's attempt to compare the conduct found in *BMW* with the conduct in this case is also without merit. In *BMW*, this Court concluded that "none of the aggravating factors associated with particularly reprehensible conduct" was present in *BMW*. In the present case, Ms. Johnson is no Dr. Gore, as recognized by the Alabama Supreme Court in finding that Life of Georgia's conduct "resulted in a great financial hardship" to

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medicaid benefits. *See* Petition, p. 4. However, at trial, Mr. Peek testified that he was aware of an additional individual who lived in Monroeville, Alabama, who was on medicaid but was also sold a Life of Georgia medicare supplement policy. *See* Tr. at 140, 511.

Ms. Johnson. This fact is particularly important, as Justice Breyer recognized in his concurring opinion in *BMW* where he stated that "tricking the elderly out of their life savings" can fairly be categorized among the "most serious kinds of misrepresentations." *BMW*, 116 S. Ct. at 1605-06. In the present case, Ms. Johnson had *no* life savings, but rather, lived month-to-month on a small social security check.

With regard to the *BMW* proportionality analysis, the $5 million punitive award does not cross the "grossly excessive" threshold. The $5 million punitive award is 20 times Ms. Johnson's compensatory damages as found by the jury. Considering the egregiousness of the fraud, coupled with the fact that Life of Georgia intentionally targeted low income, elderly individuals such as Ms. Johnson to accomplish this fraud, this ratio does not provide the necessary indicium to categorize the award as "grossly excessive."

The Alabama Supreme Court also utilized this Court's third "guidepost" announced in *BMW* in remitting the punitive award to $5 million. As Life of Georgia acknowledges, the Alabama Supreme Court explicitly relied on Alabama's weak regulation of insurance companies as justification for the $5 million punitive award. The court discussed in great length the fact that Alabama citizens who become the victims of fraud have little recourse other than through litigation. Specifically, the court found that the "record in this case is replete with expert testimony to the effect that the State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have." Pet. App. at 16a. The Alabama

Supreme Court further noted that the plaintiff has a heavy burden in proving fraud, "but it provides the only recourse a defrauded citizen of Alabama has." Pet. App. at 19a. In making these factual findings, the court necessarily found that Alabama's statutory civil and criminal penalties are seldom, if ever, sought against an insurance company's corporate executives or its agents for intentional fraud. This was shown true in this case, as neither its corporate officers nor the agents involved in this case were ever threatened with any criminal sanctions.

Moreover, Life of Georgia ignores Alabama Code § 13A-8-3 which states that the theft of more than $1,000 is considered a Class B felony that carries with it a maximum $10,000 fine and imprisonment anywhere from two to twenty years. Additionally, an habitual offender, as Life of Georgia was found to be, makes the offense a Class A felony, with a maximum fine of $20,000 and life imprisonment or not more than ninety-nine years or less than ten years. *See* Alabama Code § 13A-5-6 (1975). While Life of Georgia argues that the maximum fine in Alabama for making a false or fraudulent statement relative to an application for insurance is a mere $1,000, alternative criminal sanctions noted above demonstrates that Life of Georgia's illegal conduct with regards to Ms. Johnson carries with it the possibility of imprisonment. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991). While Ms. Johnson does not dispute that the monetary comparisons are wide, the courts below concluded that the verdict, as remitted, is reasonable punishment based upon the objective criteria presented at trial. Because the courts below faithfully applied the three "guideposts" announced in

*BMW*, no purpose would be served by entering a GVR order.

## II. Life Of Georgia Did Not Properly Preserve The Three Remaining Issues In The Courts Below.

This Court wisely refuses to review judgments rendered by a state's highest court unless the federal question was both raised and decided in the state courts below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Herdon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow proper appellate procedures provided by state law is fatal). Alabama law is consistent with federal law: constitutional arguments not raised in the trial court will not be considered on appeal in the Alabama Supreme Court. *Olympia Spa v. Johnson*, 547 So.2d 80, 86 (Ala. 1989). Because Life of Georgia failed to properly preserve the three remaining issues below, these issues should not be considered by this Court.[7]

### A. Life Of Georgia Did Not Preserve Its "Extraterritorial Punishment" Argument In The Courts Below.

Although Life of Georgia quotes extensively from respondent's opening and closing statements in its

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[7] Interestingly, Life of Georgia fails to specify where in the courts below it raised these three issues. *See* Rules of the Supreme Court 14.1(g)(i).

petition claiming error, Life of Georgia did not object to these comments at trial, although it objected to other portions of respondent's closing. Tr. 484, 514. Life of Georgia also failed to bring this alleged error to the trial court's attention at the conclusion of closing arguments, although it submitted two motions for mistrial on other grounds. Tr. 474, 477. Further, Life of Georgia never raised this issue in any one of its three post-trial motions for new trial, remittitur, and JNOV, nor in either of its two briefs in support of these motions. *See* Resp. App. at 16-29; Pet. App. at 158a-170a. Finally, Life of Georgia failed to present this legal argument at the *Hammond/ Green Oil* hearing.[8] Tr. at 557-628.

Alabama law is clear – "in order for a party on appeal to complain of comments made at trial by opposing counsel, that party must have objected specifically to those comments, pointing out substantially the language objected to," unless the comments are so grossly improper and highly prejudicial as to be beyond corrective action by the trial court.[9] *McBride v. Acceptance Ins. Co.*, 653 So.2d 978, 981 (Ala. 1995). To hold otherwise

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[8] Ms. Johnson submits that Life of Georgia's failure to object was intentional, since its trial strategy was to present evidence and argue in closing that it had improperly sold its medicare supplement policy to only ten individuals in the thirteen states that it did business, and thus had a "purity rate" of 99.95576% *nationwide*. Accordingly, Life of Georgia was responsible for "opening the door" to this argument, and cannot now complain that Respondent's "reply-in-kind" is in error.

[9] Life of Georgia did not contend on appeal that respondent's statements to the jury were so grossly improper and highly prejudicial as to be beyond corrective action by the trial court so that no objection needed to be made.

"would violate a fundamental principle of appellate jurisdiction: that issues not raised before the trial court may not be raised on appeal." *Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339, 1344 (Ala. 1987); *see also Alabama Power Co. v. Turner*, 575 So.2d 551, *cert. denied*, 111 S. Ct. 2260, 114 L. Ed. 2d 713 (1991).

Even though Life of Georgia failed to object to these comments at trial, it nevertheless raised this issue on appeal for the first time in the Alabama Supreme Court. However, after Ms. Johnson pointed out that Life of Georgia had waived this issue, Life of Georgia voluntarily withdrew this issue from consideration, stating it was *"not seeking reversal of the judgment based upon errors and/or misconduct in counsel's closing argument." See* Resp. App. at 3 (emphasis added).

Thereafter, in its reply brief in support of its application for rehearing, Life of Georgia once again conceded that it was not presenting any federal constitutional challenges to respondent's closing arguments. In brief, Life of Georgia wrote:

> Appellee argues that Life of Georgia somehow waived its federal constitutional challenge to the extraterritorial aspects of the punitive damage award by not objecting to Appellee's closing argument. *Life of Georgia's extraterritoriality argument, however, is not predicated on a challenge to Appellee's closing argument. See* Resp. App. at 6 (emphasis added).

Because Life of Georgia explicitly waived this issue in the courts below, the Alabama Supreme Court properly refused to address this argument, and therefore, a GVR order on this issue should not be granted.

### B. Life Of Georgia Did Not Timely And Properly Object To The Imposition Of Punitive Damages In This Case As Being "Duplicative Punishment."

Plenary review on this issue is not appropriate since Life of Georgia never claimed in the trial court that the imposition of punitive damages constituted "duplicative punishment." Moreover, the jury in the present action was presented with separate and additional evidence of intentional wrongful conduct on behalf of Life of Georgia which occurred after the *Foster* case was litigated. As such, Life of Georgia's contention that it was punished "for *both* alleged torts in *each* case" is simply not correct.

Life of Georgia never claimed in its answer to the complaint that a punitive damage award in this case would constitute duplicative punishment in violation of its due process rights. *See* Pet. App. at 155a-157a. Life of Georgia also failed to raise this constitutional issue in its motion for directed verdict at the close of all the evidence. *See* Resp. App. at 9-15. Moreover, although Life of Georgia now complains that the punitive damage claim should have been struck as being repetitive punishment, Life of Georgia itself submitted proposed jury instructions which specifically authorized the award of punitive damages if the jury found by clear and convincing evidence that Life of Georgia had committed intentional fraud.[10] It was only after the jury returned its punitive damage verdict that Life of Georgia wrote the following

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[10] Life of Georgia requested the trial court to charge the jury in accordance with Alabama Pattern Jury Instruction § 18.09. *See* Resp. App. 7-8.

in its post-trial brief in support of its motions for new trial, remittitur, and/or JNOV:

> Moreover, it is arbitrary and capricious for Life of Georgia to be punished on two separate occasions for alleged conduct arising out [sic] similar allegations during the same time period.

In making this statement, Life of Georgia did not cite to any specific provision of the federal constitution under which it made this challenge, nor did it cite any case law to support its contention that the award was "arbitrary and capricious." Alabama law clearly states that in order to preserve a constitutional issue for appellate review, "an appellant must identify and make *specific arguments* regarding what *specific rights* it claims have been violated." *Central Alabama Elec. Co-Op. v. Tapley*, 575 So.2d 551, 553 (Ala. 1991) (emphasis added). In this case, Life of Georgia did neither.

Assuming this Court determines that this issue was properly preserved, the cases cited by Life of Georgia as to this issue are distinguishable from the present fact situation. The intentional fraud perpetrated upon Ms. Johnson by Life of Georgia is not a "mass tort" as described by the cases relied upon by Life of Georgia. Moreover, even in "mass tort" cases, "the vast majority of courts that have addressed [this] issue have declined to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct." *Dunn v. Hovic*, 1 F. 3d 1371, 1385 (3rd Cir. 1993) (citing cases for the same proposition). Considering that Life of Georgia failed to properly preserve this issue for review, as well as the nature of the conduct involved, plenary review should not be granted.

### C. Life Of Georgia Never Claimed In The Courts Below That Alabama's Punitive Damage System Failed To Provide It With Fair Notice That Its Illegal Conduct Would Subject It To Punishment Or Of The Severity Of Punishment That Might Be Imposed.

Life of Georgia requests that this Court accept plenary review to revisit the question of whether the Alabama system contains constitutionally adequate standards to constrain the discretion of the juries and courts to impose punitive damages. While Life of Georgia raised this issue in its answer, no alternative standards or proposed jury instructions were submitted to the trial court which the jury could utilize in deciding whether or in what amount to impose punitive damages. In Alabama, as in the federal court system, a defendant must specifically object to the particular jury charge it claims as error, or it must submit written jury charges which specifically informs the trial court how to provide clearer standards. *See* Ala.R.Civ.P. 51; *see also, Alfa Mut. Ins. Co. v. Northington*, 561 So.2d 1041, 1047 (Ala. 1990) ("This Court cannot undertake to review the propriety of a trial court's oral charge unless that charge has been timely objected to and the objection has been overruled by the trial court, or a requested written jury instruction has been refused by the trial court.") Since Life of Georgia never objected to the court's oral charge or provided the court with alternative charges, the Alabama Supreme Court properly refused to address this issue.

Life of Georgia next argues that Alabama law does not provide fair notice of the conduct that will subject it

to punishment, or fair notice of the severity of the punishment. Life of Georgia takes this argument from language found in *BMW v. Gore*, 116 S. Ct. at 1598. Although it is clear that Life of Georgia never claimed that the Alabama system failed to provide fair notice in the courts below, it is equally clear that the trial court specifically requested Life of Georgia to provide it with whatever standards it believed the trial court should utilize in assessing the excessiveness of the punitive damage award. Tr. at 620. To the contrary, Life of Georgia suggested that the trial court utilize the procedures that were approved in *Haslip* in deciding whether the verdict was excessive. The only other additional criteria that Life of Georgia suggested the trial court use was that "if the judicial conscience is shocked by the amount of the award, then a new trial can be ordered." Tr. at 623.

Notwithstanding the above, in 1987, the Alabama legislature passed two statutes providing defendants additional due process safeguards in cases where punitive damages are sought. In this case, unlike in *Haslip*, the jury was instructed that the plaintiff was required to prove by "clear and convincing evidence" that the defendant "consciously or deliberately engaged in oppression, fraud, wantonness, or malice" before it could award punitive damages. Alabama Code § 6-11-20 (1975). Additionally, Alabama has modified the common law rule of vicarious liability which required Ms. Johnson to prove a higher degree of culpability on the part of Life of Georgia before punitive damages could be imposed against it for the conduct of its agent. *See* Alabama Code § 6-11-27 (1975).

These two additional safeguards guaranteed Life of Georgia procedural due process protection over and above what was found to be constitutionally adequate in *Haslip*. As such, Life of Georgia's contention that this Court should grant plenary review "to announce clear, objective and definite procedural standards that restrict the imposition of punitive damages" is without merit. This is particularly true since, if this Court denies the petition, the Alabama Supreme Court's opinion will totally change the procedure by which Alabama courts assess punitive damages and provide even higher due process guarantees. For these reasons, plenary review on this issue should be denied.

## CONCLUSION

There is no reason for this Court to enter a GVR order instructing the Alabama Supreme Court to reconsider its decision in light of *BMW*. The Alabama Supreme Court, in remitting the punitive award to $5 million, properly utilized the procedures announced in *BMW*. Further, because Life of Georgia failed to preserve the remaining three issues raised in its petition, these issues

are not properly before the Court, and plenary review would therefore be inappropriate.

Respectfully submitted,

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**IN THE SUPREME COURT OF ALABAMA**

| | | |
|---|---|---|
| LIFE INSURANCE COMPANY OF GEORGIA, | ) | Supreme Court No. 1940357 |
| Appellant, | ) | |
| vs. | ) | |
| DAISEY L. JOHNSON, | ) | |
| Appellee. | ) | |

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APPEAL FROM THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

---

# REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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April 11, 1995

* * *

## SUMMARY OF ARGUMENT

* * *

Finally, the $12,500,000 punitive damage award is grossly excessive because it was improperly based on Life of Georgia's status as an out-of-state company. If any punitive damage award is upheld by this Court, the amount should be remitted in light of the $250,000 statutory cap, which was not invalidated until after the conduct at issue occurred.

* * *

## V. THE $12,500,000 PUNITIVE DAMAGE AWARD IS GROSSLY EXCESSIVE BECAUSE IT WAS IMPROPERLY BASED UPON LIFE OF GEORGIA'S STATUS AS AN OUT-OF-STATE COMPANY

Plaintiff has failed to provide any legitimate basis for the size of the $12,500,000 punitive damage award in a case where the underlying evidence of fraud was "sharply disputed" and the out-of-pocket loss to Plaintiff was, by her own admission, only $3,132. The only explanation for a punitive damage award of this magnitude is that the jurors were improperly influenced by Life of Georgia's status as an [sic] large, out-of-state company.

Indeed, the astounding size of the award suggests that jurors simply followed Plaintiff's counsel's request that they award $100 for each of the hundreds of thousands of people *eligible* for Medicaid in the thirteen States in which Life of Georgia conducted business. After Plaintiff's counsel urged a punitive damages award of $15,083,250 based upon this calculation, R 520-21, the jury

substantially complied with this request, returning a punitive damage verdict of $15,000,000. In short, Life of Georgia was punished simply because it is a large company that does business in several states.

Plaintiff attempts to divert the Court's attention from this point by arguing that that [sic] Life of Georgia waived the issue by not objecting to Plaintiff's counsel's closing argument in the trial court. *See* Appellee's Br. at 92-93. This argument mischaracterizes the nature of the issue presented for this Court's review. Life of Georgia is not seeking reversal of the judgment based upon errors and/or misconduct in counsel's closing argument. Rather, Life of Georgia contends that, in reviewing the punitive damage award for excessiveness, this Court should consider the extent to which it reflects punishment based upon Life of Georgia's status as an out-of-state company – an issue that clearly was raised in the trial court.[6] As this Court made clear in *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 63 U.S.L.W. 3555, 63 U.S.L.W. 3562 (1995) (No. 94-896), and *Independent Life and Accident Ins. Co. v. Harrington*, No. 1921093, 1994 WL 407246, at *12 (Ala. Aug. 5, 1994), both of which

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[6] *See* Brief in Support of Defendant Life Insurance Company of Georgia's Motion For New Trial, Or In The Alternative, For JNOV, Or In The Alternative, For Remittitur at 21 n.7 ("The Supreme Court has suggested that a state punitive damage system that discriminated against out-of-stae [sic] companies might violate the Due Process Clause as well as other federal constitutional provisions. To the extent that the arbitrary verdict here can be explained by such discrimination against Life of Georgia, it would violate due process, as well as the Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution.").

were decided after the trial in this case, remittitur of a punitive damage award should be ordered to the extent that it reflects improper consideration of out-of-state factors.

* * *

THE SUPREME COURT OF ALABAMA

---

NO. 1940357

---

LIFE INSURANCE COMPANY OF GEORGIA, INC.,

Appellant,

v.

DAISEY L. JOHNSON,

Appellee.

---

ON APPEAL FROM THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA
CV-93-969

---

# APPELLANT'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

---

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January 16, 1996

* * *

## III. LIFE OF GEORGIA PRESERVED ITS ARGUMENT THAT THE PUNITIVE DAMAGE AWARD IS UNCONSTITUTIONALLY BASED UPON OUT-OF-STATE FACTORS

Appellee argues that Life of Georgia somehow waived its federal constitutional challenge to the extraterritorial aspects of the punitive damage award by not objecting to Appellee's closing argument. Life of Georgia's extraterritoriality argument, however, is not predicated on a challenge to Appellee's closing argument. Rather, Life of Georgia's argument is that its punishment cannot be upheld because it is unconstitutionally based on the Company's status as an out-of-state company providing products in many States. This argument was fully briefed on the merits in this Court and clearly preserved for appeal, given that, as Appellee acknowledges, Life of Georgia advanced the federal constitutional arguments below "that the Alabama system of awarding punitive damages was flawed in that it discriminated against out-of-state defendants." Appellee's Opp. at 11 (emphasis in original omitted).[3]

* * *

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[3] To the extent this Court intended to purge the award of its extraterritorial effects by remitting it to $5 million, Life of Georgia respectfully submits that the Due Process Clause of the Fourteenth Amendment and the Commerce Clause require, at the very least, that the Court expressly state how such a remittitur cures the constitutional defect.

*DAISEY L. JOHNSON V. LIFE INSURANCE COMPANY OF GEORGIA, et al.*, CIVIL ACTION NO. CV-93-969

DEFENDANT LIFE OF GEORGIA'S REQUESTED JURY CHARGES

| | | | |
|---|---|---|---|
| 1. | APJI § 8.00 | GIVEN ___ | REFUSED ___ |
| 2. | APJI § 8.02 | GIVEN ___ | REFUSED ___ |
| 3. | APJI § 11.00 | GIVEN ___ | REFUSED ___ |
| 4. | APJI § 11.01 | GIVEN ___ | REFUSED ___ |
| 5. | APJI § 11.02 | GIVEN ___ | REFUSED ___ |
| 6. | APJI § 11.03 | GIVEN ___ | REFUSED ___ |
| 7. | APJI § 11.03 | GIVEN ___ | REFUSED ___ |
| 8. | APJI § 18.00 | GIVEN ___ | REFUSED ___ |
| 9. | APJI § 18.01 | GIVEN ___ | REFUSED ___ |
| 10. | APJI § 18.02 | GIVEN ___ | REFUSED ___ |
| 11. | APJI § 18.03 | GIVEN ___ | REFUSED ___ |
| 12. | APJI § 18.04 | GIVEN ___ | REFUSED ___ |
| 13. | APJI § 18.05 | GIVEN ___ | REFUSED ___ |
| 14. | APJI § 18.06 | GIVEN ___ | REFUSED ___ |
| 15. | APJI § 18.07 | GIVEN ___ | REFUSED ___ |
| 16. | APJI § 18.08 | GIVEN ___ | REFUSED ___ |
| 17. | APJI § 18.09 | GIVEN ___ | REFUSED ___ |
| 18. | APJI § 18.10 | GIVEN ___ | REFUSED ___ |
| 19. | APJI § 28.00 | GIVEN ___ | REFUSED ___ |
| 20. | APJI § 28.01 | GIVEN ___ | REFUSED ___ |

21. APJI § 28.02 GIVEN ___ REFUSED ___
22. APJI § 29.00 GIVEN ___ REFUSED ___
23. APJI § 29.01 GIVEN ___ REFUSED ___

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IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

| | | |
|---|---|---|
| DAISEY L. JOHNSON<br>Plaintiff,<br>v.<br>LIFE INSURANCE COMPANY OF GEORGIA INC.<br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No.<br>CV-93-969 |

DEFENDANT LIFE INSURANCE COMPANY OF GEORGIA'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE

Defendant Life Insurance Company of Georgia ("Life of Georgia") moves the court to direct a verdict in its favor as to each claim in plaintiff's complaint, as last amended, separately and severally, and aver the following separate and several grounds:

COUNT ONE – (FRAUD)

1. Plaintiff has failed to prove a prima facie case of fraud (i.e., intentional fraud, reckless fraud, misrepresentation, suppression of material facts) against Life of Georgia.

2. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of fraud (i.e., intentional fraud, reckless fraud, misrepresentation, suppression of material facts).

3. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of fraud (i.e.,

intentional fraud, reckless fraud, misrepresentation, suppression of material facts).

4. Plaintiff has failed to produce substantial evidence that Life of Georgia owed plaintiff a duty to disclose material facts to plaintiff.

5. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia owed plaintiff a duty to disclose material facts to plaintiff.

6. Plaintiff has failed to produce substantial evidence that Life of Georgia misrepresented material facts to plaintiff.

7. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia misrepresented material facts to plaintiff.

8. Plaintiff has failed to produce substantial evidence that plaintiff justifiably relied upon any alleged misrepresentations of material facts or suppression of material facts.

9. Plaintiff has failed to produce clear and convincing evidence that plaintiff justifiably relied upon any alleged misrepresentations of material facts or suppression of material facts.

10. Plaintiff's fraud claims are barred by the statute of limitations because plaintiff discovered or should have discovered the alleged fraud more than two years prior to the filing of plaintiff's complaint.

COUNT TWO – NEGLIGENCE/WANTONNESS

11. Plaintiff has failed to prove a prima facie case of wantonness against Life of Georgia.

12. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of negligence.

13. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of wantonness.

14. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of wantonness.

15. Plaintiff's negligence and wantonness claims are barred by the statute of limitations because the alleged negligent or wanton acts undisputedly occurred in January 1990 more than two years prior to the filing of plaintiff's complaint on March 31, 1993.

COUNT THREE – BREACH OF FIDUCIARY DUTY

16. Plaintiff has failed to prove a prima facie case for Breach of Fiduciary Duty against Life of Georgia.

17. Plaintiff has failed to produce substantial evidence that Life of Georgia breached a fiduciary duty allegedly owed by Life of Georgia to plaintiff.

18. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia breached a fiduciary duty allegedly owed by Life of Georgia to plaintiff.

19. Under Alabama law, Life of Georgia did not owe plaintiff any fiduciary duty. *See Guinn v. American Intergrity Ins. Co.*, 568 So. 2d 760 (Ala. 1990). In *Guinn*, the

Alabama Supreme Court affirmed dismissal of plaintiff's claim of breach of fiduciary duty arising out of the sale of a medicare supplement policy. The plaintiff alleged that the defendants owed her a fiduciary duty because of her "advanced age, lack of mental strength, lack of knowledge of insurance matters, and the agents' superior knowledge concerning insurance." *Guinn*, 568 So. 2d at 764. In rejecting the plaintiff's arguments on appeal, the Supreme Court stated "[t]he salesperson and his principal may be liable for damages if he misrepresents material facts in an attempt to induce the prospective customer to enter into the contract. . . . However, *that potential liability does not indicate the existence of a fiduciary relationship.*" *Id.*

20. Plaintiff's breach of fiduciary duty claim is barred by the statute of limitations because the alleged breach of fiduciary duty undisputedly would have occurred in January 1990 more than two years prior to the filing of plaintiff's complaint on March 31, 1993.

COUNT FOUR – SUPPRESSION

21. Plaintiff has failed to prove a prima facie case of suppression of material facts against Life of Georgia.

22. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of suppression of material facts.

23. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of suppression of material facts.

24. Plaintiff has failed to produce substantial evidence that Life of Georgia owed plaintiff a duty to disclose material facts to plaintiff.

25. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia owed plaintiff a duty to disclose material facts to plaintiff.

26. Plaintiff has failed to produce substantial evidence that plaintiff justifiably relied upon any alleged suppression of material facts.

27. Plaintiff has failed to produce clear and convincing evidence that plaintiff justifiably relied upon any alleged suppression of material facts.

28. Plaintiff's fraud claims are barred by the statute of limitations because plaintiff discovered or should have discovered the alleged suppression of material facts more than two years prior to the filing of plaintiff's complaint.

COUNT FIVE – DECEIT

29. Plaintiff has failed to prove a prima facie case of deceit against Life of Georgia.

30. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of deceit.

31. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of deceit.

32. Plaintiff has failed to produce substantial evidence that plaintiff justifiably relied upon any alleged deceit.

33. Plaintiff has failed to produce clear and convincing evidence that plaintiff justifiably relied upon any alleged deceit.

34. Plaintiff's fraud claims are barred by the statute of limitations because plaintiff discovered or should have discovered the alleged deceit more than two years prior to the filing of plaintiff's complaint.

COUNT SIX – OPPRESSION

35. Under Alabama law, plaintiff does not have any cause of action for oppression.

36. Plaintiff has failed to prove a prima facie case of oppression against Life of Georgia.

37. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of oppression.

38. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of oppression.

39. Plaintiff's oppression claim is barred by the statute of limitations because the alleged oppression undisputedly would have occurred in January 1990 more than two years prior to the filing of plaintiff's complaint on March 31, 1993.

/s/ James W. Lampkin II
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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing pleading by depositing the same in United States mail, properly addressed with first class postage prepaid, to the following counsel of record:

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Done this 2nd day of June, 1994.

/s/ James W. Lampkin II

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

| | | |
|---|---|---|
| DAISEY L. JOHNSON<br>Plaintiff,<br>v.<br>LIFE INSURANCE COMPANY OF GEORGIA INC.<br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. CV-93-969<br>(Filed Jun. 21, 1994) |

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR NEW TRIAL, OR IN THE ALTERNATIVE, FOR REMITTITUR

Defendant Life Insurance Company of Georgia ("Life of Georgia") moves the Court to set aside the verdict of the jury and judgment entered thereon in favor of plaintiff and to enter judgment in accordance with the motions for directed verdict filed at the close of plaintiff's evidence and again at the close of all the evidence and enter judgment notwithstanding the verdict; or alternatively, for a new trial; and further in the alternative, for remittitur pursuant to general remittitur law in Alabama as well as pursuant to requirements of the Court set forth in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 593 So. 2d 218 (Ala. 1989). As grounds therefore, Life of Georgia assigns the following grounds, separately and severally, as to judgment on each verdict, separately and severally:

1. Plaintiff failed to sustain her burden of proof in regard to producing substantial evidence that plaintiff justifiably relied upon defendant's alleged misrepresentation to her detriment.

2. Plaintiff failed to prove by substantial evidence all the requisite elements of fraud.

3. Plaintiff failed to establish a *prima facie* case.

4. There is insufficient evidence that defendant was guilty of fraud as alleged by plaintiff to sustain judgment on the verdict.

5. Plaintiff failed to prove the requisite evidence of justifiable reliance.

6. The record affirmatively shows defendant was not guilty of fraud or misrepresentation as alleged by plaintiff.

7. Plaintiff failed to prove by clear and convincing evidence that Life of Georgia was guilty of fraud and such proof is required to warrant submitting a punitive damage claim to a jury and to support an award of punitive damages.

8. The Court erred by not granting Life of Georgia's motion for summary judgment as to Counts Two and Three of plaintiff's complaint prejudicing defendant in that it allowed the jury to hear prejudicial evidence later ruled not material or relevant to the issue submitted to the jury.

9. The Court erred by not granting Life of Georgia's motion in limine concerning evidence of failure to train, monitor and supervise agents and breach of fiduciary duty as claimed by plaintiff prejudicing defendant in that it allowed the jury to hear prejudicial evidence later ruled not material or relevant to the issue submitted to the jury.

10. The Court erred in denying Life of Georgia's motion in limine to exclude evidence concerning Barbara Holt's termination and the reasons therefore and allowing plaintiff to introduce this evidence. This evidence was immaterial, irrelevant, unduly prejudicial and constituted inadmissible hearsay. The admission of this evidence was so prejudicial as to deny Life of Georgia a fair trial.

11. The Court erred in allowing each category of evidence which was the subject of Life of Georgia's motion in limine, which was denied. The admission of each category of evidence outlined in that motion was so prejudicial as to deny Life of Georgia a fair trial.

12. The Court erred in overruling defendant's objections to evidence offered by plaintiff. More specifically, but without waiving any objections not set out herein, the trial court erred in allowing plaintiff to produce pattern and practice evidence from Mattie Foster, Rosa D. James and Annie Ruth McCovery because plaintiff failed to lay the proper predicate that there was a substantial similarity between those incidents and the case at hand. Additionally, this evidence did not constitute a pattern or practice of fraud as contemplated by Alabama law. The trial court erred in allowing plaintiff to produce evidence from Eric Peek, Bobby Creps and Russell Clark over Life of Georgia's objections. This evidence should not have been admitted for the reasons contained in Life of Georgia's motion for summary judgment and motion *in limine.* The trial court erred in allowing plaintiff to introduce plaintiff's exhibits 29, 30, 31, 32, 33, 34 and 41 over Life of Georgia's objections.

13. The Court erred in excluding evidence that Life of Georgia had paid claims on behalf of plaintiff pursuant to the terms of the Medicare supplement policy and refusing to allow Life of Georgia to introduce Defendant's Exhibit 20. The exclusion of this evidence was highly prejudicial to Life of Georgia.

14. The Court erred in not granting defendant's motion for directed verdict as to all counts of plaintiff's complaint at the close of plaintiff's evidence, and again at the close of all the evidence.

15. The Court erred in not granting Life of Georgia's motion for directed verdict as to Counts Two and Three of plaintiff's complaint prejudicing defendant in that it allowed the jury to hear prejudicial evidence later ruled not material or relevant to the issue submitted to the jury.

16. The Court erred in denying defendant's motion for mistrial after plaintiff voluntarily dismissed Counts Two and Three immediately prior to the case being submitted to the jury and after the jury was allowed to hear prejudicial evidence that was not material or relevant to the issue submitted to the jury.

17. There was improper argument by counsel for plaintiff in closing argument, which was objected to and said objections were overruled. This improper argument was highly prejudicial, intended to inflame the jury and a comment upon the wealth of Life of Georgia. The improper argument denied Life of Georgia a fair trial.

18. The Court erred in commenting on the evidence produced during the trial. During the presentation of Life of Georgia's defense concerning the training provided to

agents, the Court, in the presence of the jury, commented to the effect: "Do we have to hear any more of this?" This comment constitutes an improper comment on the evidence by the Court and was highly prejudicial to Life of Georgia.

19. Plaintiff failed to sustain her burden of proof in regard to the imposition of *any* punitive damages in this case in that plaintiff failed to sustain her burden of proving what is required prior to the imposition of punitive damages by Alabama Code § 6-11-20 (Supp. 1993) (proof by clear and convincing evidence) and § 6-11-27 (Supp. 1993) (principal not liable for actions of servant). Moreover, plaintiff failed to sustain her burden of proof that Life of Georgia acted "maliciously, oppressively and/or grossly" as required by Alabama Code § 6-11-20 (Supp. 1993).

20. The verdicts are contrary to the law of the case.

21. The verdicts are contrary to the facts of the case.

22. The verdicts are not sustained by the great preponderance of the evidence.

23. The verdicts are based on speculation and conjecture.

24. The verdicts are excessive in regard to the facts and/or the law.

25. The amount of the verdicts is opposed to the clear and convincing weight of the evidence and accordingly fails to do justice.

26. The amount of the verdicts demonstrate that they are the result of improper bias, prejudice or passion.

27. There is insufficient evidence in the record to sustain any award of damages for mental anguish.

28. The award of compensatory damages against Life of Georgia was excessive and not supported by the evidence.

29. The award of punitive damages against Life of Georgia was excessive and not supported by the evidence.

30. The verdict rendered against Life of Georgia is the result of improper passion, bias or prejudice caused by the Court's rulings admitted [sic] evidence concerning: (1) training, supervision and monitoring of agents, (2) breach of fiduciary duty; (3) pattern and practice witnesses, and (4) the termination of Barbara Holt's employment and the reasons therefore. This evidence was immaterial, irrelevant and unduly prejudicial to the issues submitted to the jury. This evidence was introduced solely to inflame the passions and prejudice the jury against Life of Georgia and denied Life of Georgia a fair trial.

31. Venire members either did not answer or did not truthfully answer questions posed to them during voir dire so that Life of Georgia was deprived of its right to fully examine members of the venire before Life of Georgia had to exercise its strikes. This error was so prejudicial that it deprived Life of Georgia of a fair trial.

32. The Court committed reversible error in denying defendant's motion that its Affirmative Defenses relating to plaintiff's claims for punitive damages were sustained.

33. The Court committed reversible error in denying defendant's motion that is [sic] Affirmative Defenses relating to the unconstitutionality of plaintiff's claims for punitive damages were sustained.

34. The evidence will only sustain a compensatory award of the amount of premiums plaintiff lost, and not any award for mental anguish, on the grounds that there is no or insufficient evidence of mental anguish actually suffered by plaintiff.

35. Separate from the question whether there was sufficient evidence of fraud to submit to the jury, there was insufficient evidence to sustain plaintiff's burden of proof pursuant to Alabama Code §§ 6-11-20 (Supp. 1992) and accordingly no award of punitive damages may be sustained.

36. Plaintiff's claim for punitive damages is invalid in that the authority on which the claim is based is unconstitutional on the following joint and several constitutional grounds: a) The prohibition against ex post facto law is violated; b) Due process of law is denied; c) The equal protection of the laws is denied; d) Excessive fines and unusual punishments are imposed; e) Defendant's privileges or immunities are abridged; f) The authority is arbitrary, capricious of [sic] unreasonable; g) The authority or its effect is a law impairing the obligations of contract; h) The authority and its effect deprives defendant of liberty or property without due process of law.

37. With regard to the judgment on the punitive damage verdict, the lack of sufficient standards violates the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 6 of

the Alabama Constitution (1901). Further, the imposition of damages violates the Eighth Amendment to the United States Constitution. The judgment also violates Article I, Sections 15 and 22 of the Alabama Constitution (1901) and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The procedures for the award of punitive damages violates this defendant's right to a jury trial pursuant to state and federal constitutions.

38. Pursuant to a proper *Hammond/Green Oil* analysis, Life of Georgia is entitled to remittitur of the compensatory and punitive damage awards for reasons which will be set forth in more detail in a proposed Order on Post-Trial Motions which Life of Georgia will file, and which will address the appropriate *Hammond/Green Oil* factors, discussed more fully in D. Carr, *Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here?* 51 Ala. Lawyer 90 (March, 1990) and A. Citrin, *Post-Judgment Review of Punitive Damages: A Four Step Approach to Hammond and Green Oil*, Vol. 11, No. 2 Alabama Trial Lawyers Journal 26 (Summer 1991). In sum, applying the proper *Hammond/Green Oil* factors as discussed in the two articles cited to the case at bar mandates a substantial remittitur of both the compensatory and the punitive award.

WHEREFORE, Life of Georgia respectfully submits it is entitled to judgment notwithstanding the verdict; or in

the alternative, to a new trial; or further in the alternative, to remittitur of the compensatory and/or the punitive awards.

/s/ Davis Carr
DAVIS CARR
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Attorneys for Defendant

OF COUNSEL:

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing pleading by depositing the same in United States mail, properly addressed with first class postage prepaid, to the following counsel of record:

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Reggie Copeland, Jr.
Post Office Box 2727
Mobile, Alabama 36652

Done this day, June 21, 1994.

/s/ James W. Lampkin II

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

| | | |
|---|---|---|
| DAISEY L. JOHNSON<br>Plaintiff,<br>v.<br>LIFE INSURANCE COMPANY OF GEORGIA INC.<br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. CV-93-969<br>(Filed Jun. 30, 1994) |

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR NEW TRIAL, OR IN THE ALTERNATIVE, FOR REMITTITUR

Defendant Life Insurance Company of Georgia ("Life of Georgia") amends its Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial, or in the alternative, for Remittitur and says as follows:

1. Life of Georgia expressly adopts and incorporates paragraphs 1 through 38 of its original post-trial motion as set forth fully herein.

39. The punitive damage award is due to be remitted from $15 million down to $250,000.00 pursuant to Ala. Code § 6-11-21 (Supp. 1993).

40. On June 25, 1993, the Alabama Supreme Court released its opinion in *Henderson* and held that Ala. Code § 6-11-21 (Supp. 1993) violated the Alabama Constitution.

41. On June 24, 1994, the United States Supreme Court released its opinion in *Honda Motor Co. v. Oberg*, ___ U.S. ___ (1994 WL 276687 June 24, 1994). In its opinion,

the Court specifically recognized that its previous opinions in *TXO* and *Haslip* prevent state courts from abolishing limits on punitive damage awards. The Court stated "the TXO and Haslip opinions establish that States *cannot abolish limits on the award of punitive damages.*" *Oberg*, ___ U.S. at ___, 1994 WL 276687 at 9, n. 9.

42. Pursuant to the Supremacy Clause of the United States Constitution, *Oberg* overrules this Court's opinion in *Henderson* and re-establishes the cap on punitive damages under Ala. Code § 6-11-21 (Supp. 1993). Accordingly, the punitive damage award is due to be remitted pursuant to Ala. Code § 6-11-21 (Supp. 1993).

WHEREFORE, Life of Georgia respectfully submits it is entitled to judgment notwithstanding the verdict; or in the alternative, to a new trial; or further in the alternative, to remittitur of the compensatory and/or the punitive awards.

/s/ Davis Carr
DAVIS CARR
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Done this day, June 30, 1994.

/s/ James W. Lampkin II

**IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA**

| | | |
|---|---|---|
| DAISEY L. JOHNSON<br>Plaintiff,<br>v.<br>LIFE INSURANCE COMPANY OF GEORGIA INC.<br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CASE NO: CV-93-969 |

**DEFENDANT'S SECOND AMENDED MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, OR, IN THE ALTERNATIVE, MOTION FOR REMITTITUR**

Defendant Life Insurance Company of Georgia ("Life of Georgia"), amends its Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial, or in the alternative, for Remittitur and states as follows:

1. Life of Georgia expressly adopts and incorporates paragraphs 1 through 38 of its original post-trial motion and paragraphs 39 through 42 of its amended post-trial motion as if fully set fully herein.

2. As additional grounds in support of this motion Life of Georgia would show that the verdict was based upon evidence from Life of Georgia's former employee Eric Peek, whose testimony, in part, is believed to constitute perjury, namely testimony concerning the training of agents concerning the Medicare supplement policy.

3. This amendment constitutes a clarification of the grounds set forth in Life of Georgia's original motion in

paragraphs 9, 11, 12 and 30. However, those paragraphs are not nor are they intended to be limited by this amendment.

WHEREFORE, Life of Georgia, requests this Court enter judgment in its favor, notwithstanding the verdict, or, in the alternative, that Life of Georgia be granted a new trial, or, in the alternative that Life of Georgia be granted a remittitur for the reasons set forth above and for the reasons set forth in Life of Georgia's original motion and amended motion.

/s/ James W. Lampkin II
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Attorneys for Defendant

OF COUNSEL:

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing pleading by hand delivery to the following counsel of record:

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Done this day, September 15, 1994.

/s/ James W. Lampkin II